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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

CAESARS ENTERTAINMENT CORPORATION d/b/a RIO ALL-SUITES HOTEL AND CASINO, Respondent, and INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 16, LOCAL 159, AFL-CIO, Charging Party.	No. 28-CA-060841 **CHARGING PARTY'S SUPPLEMENTAL BRIEF**

The Board issued an Order granting the Respondent's "Motion for Leave to File Supplemental Brief in Support of Its Exceptions to the Decision of the Administrative Law Judge" on December 17, 2018. The Order was a little bit puzzling since the request to file the Supplemental Brief had been filed on January 23, 2018, shortly after the Board issued its decision in *The Boeing Company*, 365 NLRB No. 150 (2017). In the meantime, the Board issued its Notice on August 1, 2018, requesting public briefing on the so-called *Purple Communications* issue. See *Purple Communications, Inc.*, 361 NLRB No. 126 (2014).

Caesars and the parties had the opportunity to brief the *Boeing* issues and largely did so.

It is thus quizzical or maybe strange that the Board would grant the motion. Nonetheless,

it did so, but Caesars chose to file nothing. It chose to not even notify the Board it would file nothing.

There is a reason why Caesars chose to file nothing. It is because the Board has effectively overruled *Boeing* in its decision issued on December 27, 2018, in *International Brotherhood of Electrical Workers Local Union 357*, 367 NLRB No. 621 (2018).

In *Electrical Workers Local 357*, the Union sent a letter of its intent to engage in a strike against a primary employer because of its failure to pay area standards to the local Building Trades Council. The Union also sent a copy to the Las Vegas Convention and Visitors Authority (LVCVA), where the work was being performed. There is no dispute that the employer named in the letter was a primary employer and the Union had the right to strike that employer. The letter did not threaten picketing but only striking "for any all jobs because of not paying area standards." See 367 NLRB No. 61, slip op. at 1 fn. 4. For some unexplained reason, the Board treated the letter as a threat to picket. A copy was sent to the public agency that was the operating authority for the convention area where the primary employer was working.

The Board found that the accurate statement was, however, inherently coercive and therefore had to be modified with language in which the Union stated that it would engage in only lawful picketing or some other undefined phraseology that "it will comply with legal limitations on common situs picketing so as to not entangle neutrals." *Id.* at 3.

The Board majority is imposing an unexplained double standard. The Board majority states:

> It would be unrealistic to expect neutral employers, many with little experience in arcane common-situs picketing law, to assume the union would avoid enmeshing them in the picketing.

Id. at 2.

The same is, of course, true of many employees who view employer's rules. They don't understand the "arcane" language of Board decisions. They simply read the rules and, knowing that the employer can discipline them because they are at will employees; do not engage in activity that may be covered by the rule to avoid the threat of discipline, up to and including termination.

It is a double standard because no employer is required to state that it will apply its ambiguous rules in compliance with the law or a similar phrase.

Moreover, the Board's holding is silly at best. The so-called neutral was the Las Vegas Convention and Visitors Authority, which hosted almost 39,000, 000 visitors during 2018 and 6,280,000 convention visitors in 2018. See LVCVA, Las Vegas Visitor Statistics, Year-to-Date Summary 2018, https://www.lvcva.com/stats-and-facts/visitor-statistics/. Las Vegas is a largely UNION town on the strip and certainly at the LVCVA. The employees of the LVCVA are represented by a union under the terms of Nevada's collective bargaining statute. See LVCVA/SEIU Local 1107, Collective Bargaining Agreement (July 1, 2013 – June 30, 2018), https://assets.simpleviewcms.com/simpleview/image/upload/v1/clients/lasvegas/SEIU_Agreement_62efcf6e-613f-439c-9a51-26e2e7bfba88.pdf. The LVCVA can hardly be a simpleton with "little experience in arcane, common-situs picketing law." And hopefully it has access to lawyers in Las Vegas who, if they are unable to answer the question, can read a good treatise such as "Labor Law Analysis and Advocacy" by Robert Gorman and Matthew Finkin (Juris 2013).

The majority effectively holds employers cannot understand rules and statements since they have "little experience," so they should be protected with more explicit but none-the-less ambiguous disclaimers. Yet under *Boeing*, the employer can actually implement and enforce a rule that prohibits lawful protected activity if there is a business justification. See 365 NLRB No. 154, slip op. at 3-4 (Category 1 and 2 rules). The contradiction between *Electrical Workers Local 357* and *Boeing* is so obvious, the majority in *Electrical Workers Local 357* had to hide their unsuccessful attempt to explain their position in a footnote. The footnote utterly fails and highlights the contradiction. Simply put, in the Board's view, employers are stupider and less

experienced than workers and so they need to have more explicit statements made to them about the Act than workers.[1] This view is utterly ridiculous in concept.

Rules that employers impose do contain coercive language because they are ambiguous and overbroad. Workers will necessarily be coerced. In *Electrical Workers Local 357*, the Board finds the Union's conduct unlawful while sanctioning employer rules, which are more coercive as maintained and applied to workers.[2]

In summary, *Electrical Workers Local 357* points out the inherent contradiction in the Board's treatment of employer rules and worker and Union communications. Where rules prohibit any form of protected concerted activity, whether expressly or ambiguously, they are inherently coercive, and they should be found to be unlawful, just like the Union's letter, which was facially lawful and protected by the First Amendment.

Because this new case effectively overrules the *Boeing* case, the Board should find that Caesars' Electronic Communications Policy was unlawful for the reasons previously argued or that it was lawful because it allowed communications protected by Section 7 during work time.

Dated: January 17, 2019

Respectfully Submitted,

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/s/ David A. Rosenfeld

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[1] Ironically, Section 8(b)(4)(ii)(B) encompasses coercion of "any person," not just the "neutral employer, the Las Vegas Convention and Visitors Authority." 367 NLRB No. 61, slip op. at 1. The Board erroneously stated the LVCVA is an employer. It is not an employer because it is a public entity but it is a person within the meaning of Section 8(b)(4)(ii)(B). See *Plumbers Local 298 v. Cty. of Door*, 359 U.S. 354, 358-59 (1959). This is.

[2] We hasten to point out the First Amendment problems inherent in the Board's rule. Those issues are not triggered in this case, and we do not address them even though employers have done so. Here, the LVCVA is a public entity, and the Union has a right to picket or threaten to picket the LVCVA even though the LVCVA is construed to be a person within the meaning of Section 8(b)(4)(ii)(B). See also *NLRB v. Iron Workers Local 433*, 891 F.3d 1182 (9th Cir. 2018).

PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction this service was made. I am over the age of eighteen years and not a party to the within action.

On January 17, 2019, I served the following documents in the manner described below:

CHARGING PARTY'S SUPPLEMENTAL BRIEF

☑ (BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kkempler@unioncounsel.net to the email addresses set forth below.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on January 17, 2019, at Alameda, California.

/s/ Karen Kempler
Karen Kempler